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12
13 IN THE UNITED STATES DISTRICT COURT
14 THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 MICHAEL SAVAGE,

) Case No. CV07-06076 SI

17 Plaintiff,

) **REPLY TO OPPOSITION TO MOTION
FOR JUDGMENT ON THE PLEADINGS**

18 v.

) Date: March 7, 2008
19) Time: 9:00 a.m.
RELATIONS, INC., COUNCIL ON) Courtroom 10, 19th Floor
AMERICAN ISLAMIC RELATIONS ACTION) Honorable Susan Illston
20)
NETWORK, INC., COUNCIL ON AMERICAN)
ISLAMIC RELATIONS OF SANTA CLARA,)
21)
INC., and DOES 3-100,)
22)
Defendants.)

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I. INTRODUCTION

2 CAIR's use of the limited audio excerpts of Savage's radio program to comment on and
3 criticize Savage's nationally-syndicated radio program is, as a matter of law, fair use. No facts are
4 in dispute, and all of the four fair use factors weigh strongly in CAIR's favor. Savage fails to
5 counter CAIR's fair use arguments, and his insistence that political speech is not a protected fair
6 use and that critics may only use copyrighted materials to counter individualized personal attacks
7 by a copyright holder does not have the slightest grounding in law. *See Hustler Magazine Inc. v.*
8 *Moral Majority, Inc.*, 796 F.2d 1148, 1153-1155 (9th Cir. 1986). Now that Savage has
9 impermissibly premised his RICO claim on CAIR's alleged infringement, his failure to offer even
10 a colorable argument as to how CAIR's response and criticism of his radio program is not a
11 protected fair use confirms that this lawsuit is nothing more than a transparent attempt to
12 unlawfully silence an effective critic. *See Section III infra.*

13 Savage’s Opposition also cannot overcome the multiple deficiencies in the RICO claim in
14 his twice amended Complaint.¹ First, Savage cannot satisfy the standing requirements for a RICO
15 cause of action by claiming advertising losses, since any losses come from CAIR’s exercise of
16 constitutionally protected speech. Second, Savage completely ignores the proximate cause
17 requirement that is the heart of any civil RICO claim. Third, Savage fails to establish that CAIR
18 directed or played a management role in a “RICO enterprise” involving Al Qaeda and/or Hamas,
19 as he must to make a claim under sections 1962(c) and (b). Fourth, Savage’s insistence that he
20 pleaded facts establishing a section 1962(a) money laundering RICO violation fails as a matter of
21 law because Savage has not met the requirement to show that he suffered an injury by reason of
22 improper use of racketeering income. Finally, Savage still has not met the particularity
23 requirements for pleading predicate acts of fraud, as required under Federal Rule 9(b). For each of
24 these independent reasons, Savage’s RICO claim should be dismissed with prejudice.

²⁷ ¹ Savage filed his Second Amended Complaint on Feb. 14, 2008 and refiled it fixing a small error
²⁸ on Feb. 19, 2008. The parties stipulated and the Court ordered that this filing does not moot this Motion and that Defendants Council on American-Islamic Relations, Inc., Council on American-Islamic Relations Action Network, Inc., have joined this Motion. See Stip. & Order at 2-3.

II. ARGUMENT

A. Evaluation of Fair Use Defense at Judgment on the Pleadings Stage is Proper Where, As Here, No Material Facts are In Dispute.

4 Savage’s assertion that affirmative defenses in general – and assertions of fair use
5 specifically – are “trial defenses” and “cannot be determined in CAIR’s favor in the context of a
6 Rules 12(c) motion” is without merit. *See* Savage’s Opposition to Motion for Judgment on the
7 Pleadings (“Opp.”) at 1. A motion brought pursuant to Fed.R.Civ.P. 12(c) is “designed to dispose
8 of cases where the material facts are not in dispute and a judgment on the merits can be rendered
9 by looking to the substance of the pleadings and any judicially noticed facts.” *Hebert Abstract*
10 *Co., Inc. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990). In order to evaluate such
11 a motion, it is not only proper but necessary to evaluate affirmative defenses where, as here, no
12 facts beyond those alleged in the complaint are necessary to make such a determination. *See, e.g.,*
13 *McCready v. eBay, Inc.*, 453 F.3d 882, 892 FN.2 (7th Cir. 2006); *Spruill v. Gillis*, 372 F.3d 218,
14 233 n.2 (3rd Cir. 2004); *Employers Ins. of Wausau v. Price Aircraft Co., LLC*, 283 F.Supp.2d
15 1144, 1147 (D. Hawaii 2003).

16 As previously discussed by CAIR in its moving papers (see CAIR’s Memorandum of
17 Points & Authorities ISO Motion for Judgment on the Pleadings (“CAIR’s Opening Brief”) at 6),
18 where (as here) the operative facts are presumed or admitted, the Court may make a fair use
19 determination as a matter of law. *See, e.g., Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522,
20 530 (9th Cir. 2008); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1468 (9th Cir. 1988); *Fisher v. Dees*, 794
21 F.2d 432, 435-36 (9th Cir. 1986); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F.Supp.2d
22 962, 971-972 (C.D. Cal. 2007).

B. The Enumerated Fair Use Factors All Favor CAIR.

24 CAIR will not repeat its detailed arguments regarding application of the fair use factors to
25 its criticism of the Savage radio show excerpts. *See* CAIR’s Opening Brief at 4-12. In reply,
26 however, CAIR specifically addresses several misunderstandings and flat-out misapplications of
27 controlling case law offered by Savage in his Opposition.

1 1. **The “Purpose and Character of the Use” Factor Evaluates the Manner**
 2 **of the Use, Not the Motivation Behind It.**

3 Savage’s assertion that “CAIR’s affirmative defense relies upon a jury believing that CAIR
 4 is a charity and a civil rights group” betrays a significant misunderstanding of the first enumerated
 5 factor. Opp. at 5. This factor asks the Court to examine the “purpose and character of the use,”
 6 not the alleged motivation behind it. This is a straightforward test, and properly applied, it weighs
 7 heavily in CAIR’s favor. On its face,² the web page cited by Savage on which the link to the radio
 8 excerpts appears clearly comments on and criticizes the substance of that program. *See* Parvez
 9 Decl. Ex. A. For example, CAIR calls for “radio listeners of all faiths” to contact companies that
 10 advertise on Savage’s program “to express their concerns about the host’s recent anti-Muslim
 11 tirade.” *Id.* After describing how Savage “screamed attacks on Muslims, Islam and the Quran,
 12 Islam’s revealed text, during his October 29, 2007, program,” CAIR then includes comments from
 13 its communications director warning that Savage “obviously cares little about the safety or civil
 14 rights of American Muslims” and that “hate-filled words can and do lead to violent actions against
 15 American Muslims.” *Id.* “Comment” and “criticism” such as CAIR’s web page critique are
 16 explicitly permitted under 17 U.S.C. § 107. By contrast, neither the statute nor any applicable
 17 case law directs the court to analyze any underlying “motive” behind that criticism or
 18 commentary. The first factor asks “what use was made,” not “who is the user.” *See* William
 19 Patry, *Patry on Copyright* § 10:13 (2007).

21 2 In evaluating the purpose and character of CAIR’s use of the Savage radio excerpts, the Court is
 22 obligated to review the context of that use. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 487
 23 F.3d 701, 722 (9th Cir. 2007) (finding that Google’s use of thumbnail versions of copyrighted
 24 images in its “Image Search” application was transformative, as it placed the images “in a new
 25 context to serve a different purpose.”); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792,
 26 796-98, 800-06 (9th Cir. 2003) (concluding that photos parodying Barbie by depicting “nude
 27 Barbie dolls juxtaposed with vintage kitchen appliances” was a fair use). While all factual
 28 allegations must be taken as true for purposes of a 12(c) motion for judgment on the pleadings, no
 factual allegations are in dispute here, and the court must draw the legal conclusions from all of
 the material factual allegations, including the use of the clips within the context of CAIR’s
 criticism. *See, e.g., JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581-82 (6th Cir. 2007)
 (court “need not accept as true legal conclusions or unwarranted factual inferences” pursuant to
 ruling on a 12(c) motion) (citing *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)); *Madonna v. U.S.*, 878 F.2d 62, 65 (2nd Cir. 1989) (pleader’s own legal conclusions and characterizations need
 not be accepted in considering Rule 12(c) motion for judgment on the pleadings).

1 Savage's reliance on *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539
 2 (1985) is inapposite. The "good faith and fair dealing" inquiry cited by the *Harper* Court refers to
 3 its ability to consider whether the copyrighted material was obtained in an illegal or immoral
 4 manner – in that case the theft and publication of a previously unpublished manuscript. *See, e.g.*,
 5 *Harper*, 471 U.S. at 562-63. No such illicit behavior is at issue here.³ CAIR obtained audio
 6 excerpts of Savage's publicly broadcast radio program legally (Savage makes no allegations to the
 7 contrary) and engaged in the kind of fair use explicitly authorized by the Copyright Act. That
 8 Savage has alleged that CAIR is involved in far-flung international conspiracies – quite separate
 9 from its criticism of the copyrighted work at issue – is irrelevant.⁴

10 Savage further erroneously argues that fair use criticism and commentary is limited to
 11 defending one's self or an identifiable individual. *See* Opp. at 13-16. Not surprisingly, Savage
 12 cannot point to a single case that stands for this proposition, nor can he explain what the rationale
 13 for such a rule would be. *Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir.
 14 1986), cited by Savage for the this point, holds no such thing. Allowing individuals to respond to
 15 criticism aimed at them is an important interest protected by the fair use doctrine, as the *Hustler*
 16 Court recognized. Nowhere does the Court suggest, however, that this type of criticism amounts
 17 to the exclusive range of commentary and criticism permitted by the Copyright Act, nor could it
 18 given the lack of any such limitation in the statute itself. *See* 17 U.S.C. § 107. Indeed, *Hustler*
 19 directly contradicts Savage's assertion: The Court's fair use holding applied not only to Falwell
 20 (the individual criticized in the original magazine advertisement) but also to defendants Moral
 21 Majority, Inc. and Old Time Gospel Hour, a "conservative political lobbying group" and a

22 ³ Savage's argument that CAIR's use of the excerpts "was intended to destroy the value and
 23 credibility of the work" is similarly irrelevant and does not, even if true, support the type of "bad
 24 faith" consideration in *Harper*. *See* Opp. at 2.

25 ⁴ In any case, even if the type of "bad faith" allegation seen in *Harper* were at issue here (and it is
 26 not), the Supreme Court and subsequent courts of appeal have properly cast doubt upon the
 27 relevance of any such "bad faith" inquiry to a fair use analysis as a whole. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) ("[R]egardless of the weight one might
 28 place on the alleged infringer's state of mind," failure to ask for or obtain permission is irrelevant
 "[i]f the use is otherwise fair."); *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 479 n.2 (2nd Cir.
 2004) ("[A] finding of bad faith is not to be weighed very heavily within the first fair use factor
 and cannot be made central to fair use analysis."). *See also Religious Technology Center v.
 Netcom On-Line Communication Services, Inc.*, 923 F.Supp. 1231, 1244 n.14 (N.D.Cal. 1995).

1 “corporate sponsor of religious television and radio broadcasts,” respectively, which both
 2 distributed hundreds of thousands of mailings in order to defend Falwell. *Hustler*, 796 F.2d at
 3 1150. The narrow rule suggested by Savage would certainly come as a surprise to the long line of
 4 courts finding criticism created in a manner unrelated to defending against personalized attacks to
 5 be fair use. *See, e.g., Campbell*, 510 U.S. at 573; *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253,
 6 1260, 1265 (2nd Cir. 1986).

7 Savage’s additional emphasis on the alleged “political” motivation behind CAIR’s use of
 8 the audio excerpts further bolsters the conclusion that the first fair use factor strongly weighs in
 9 CAIR’s favor. *See, e.g.,* Opp. at 5 (Savage “alleges that there is a non-charitable, political purpose
 10 in the use of the segment.”). Political speech is “at the core of what the First Amendment is
 11 designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003). Explicitly recognizing that
 12 fact, courts repeatedly have held that the “liberal use of [copyrighted] material for such a purpose
 13 should be permitted.” William Patry, *Patry on Copyright* § 10:127 (2007). The Ninth Circuit in
 14 *Hustler* specifically found the defendant’s use of copyrighted materials for political purposes to be
 15 a fair use. *Hustler*, 796 F.2d at 1156 (“[T]he Defendants used the copies to generate moral
 16 outrage against their ‘enemies’ and thus stimulate monetary support for their political cause.”).
 17 *See also National Rifle Ass’n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559,
 18 562 (6th Cir. 1994); *Keep Thomson Governor Committee v. Citizens for Gullen Committee*, 457 F.
 19 Supp. 957, 961 (D.N.H.1978).

20 In short, CAIR need not prove (and Savage gains nothing from attempting to disprove) that
 21 it is a “charity and civil rights group.” *Anyone* may utilize copyrighted materials for purposes of
 22 commentary and criticism – political or otherwise – regardless of who or what the speaker
 23 supports (publicly or privately).

24 2. **The “Amount and Substantiality” of the Use – To Be Determined as a**
 25 **Matter of Law – Favors CAIR.**

26 Savage also misunderstands the application of the third factor to a fair use analysis.⁵
 27 Indeed, he does not even suggest that CAIR’s analysis – that the amount and substantiality of the

28 ⁵ As CAIR explained in its Opening Brief at 9-10, the second fair use factor is not seriously in

1 excerpts favor CAIR – is incorrect. Rather, he asserts that “the meaning of ‘heart’ of the Savage
 2 performance may be determined by the length of the entire show in the abstract or a jury may be
 3 more interested in the length of the segment.” Opp. at 9. This assertion makes no sense and is
 4 incorrect.

5 Accepting Savage’s allegations as true, the third factor analysis favors CAIR in terms of
 6 both amount as well as substantiality. As alleged by Savage, CAIR provided a link on its website
 7 to slightly more than four minutes of audio excerpts from a two-hour daily radio talk show
 8 program.⁶ This amount is comparable as a percentage to the amount used in the lead case cited by
 9 Savage in his “amount and substantiality” argument, *Video-Cinema Films, Inc. v. Lloyd E. Rigler-
 10 Lawrence E. Deutsch Foundation*, 2005 U.S. Dist. 26302 (S.D.N.Y. 2005). In that (unpublished)
 11 case, the district court noted that the amount of the material used “was extremely small in
 12 comparison with the total length of the movie,” that “no reasonable jury would conclude that the
 13 [excerpt] is the ‘heart’ of the film,” and that, consequently, the factor weighed in favor of fair use.
 14 *Id.* at *30.

15 More important to the application of the third fair use factor is a determination of the
 16 qualitative substantiality of the use and whether it amounts to the “heart” of the work. On this
 17 point, Savage yet again effectively makes CAIR’s point for it. As he does in his Complaint,
 18 Savage repeatedly argues that the excerpts did *not* capture the essence of Savage’s work and that
 19 his program really is “about” other things. Opp. at 10. Additional examples of Savage repeatedly

20 play, and Savage’s Opposition offers no analysis beyond what amounts to an argument for the
 21 third factor.

22 ⁶ CAIR again notes that although he has failed to plead it as required, Savage has apparently
 23 registered the copyright in the October 29, 2007, episode of the “Michael Savage Show” as a
 24 whole. *See* Copyright Registration Number SR0000610214, registered December 17, 2007,
 25 attached as Exhibit A to Zimmerman Decl. in Support of Request for Judicial Notice. Having
 26 registered the program in its entirety as a *single work*, he is barred from now arguing that an
 27 “amount and substantiality” analysis can be undertaken by comparing the CAIR excerpts to
 28 incremental portions. *See, e.g.*, Melville and David Nimmer, *Nimmer on Copyright* § 13.05[A][3]
 (“[T]he plaintiff manifestly cannot be heard to argue that the defendant’s copying of brief passages
 vouchsafes their qualitative significance or to argue that it could have separately registered as an
 individual “module” each snippet that defendant copied.”); *NXIVM Corp.*, 364 F.3d at 481
 (“Plaintiffs cite no authority to support [its position] – the third factor could [otherwise] depend
 ultimately on a plaintiff’s cleverness in obtaining copyright protection for the smallest possible
 unit of what would otherwise be a series of such units intended as a unitary work.”).

1 asserting that the excerpts did not amount to the heart of the work can be found in the Complaint
 2 at paragraphs 31-33, 35, 36, 37, 39, and 42. *See, e.g.*, Compl. at ¶ 32 (“The stolen material as
 3 repackaged by CAIR was intended to portray both the material and the creator of the material,
 4 Michael Savage as having a blanket opposition to a particular religion. This was not the context
 5 of the statement and it is not consistent with the content of the programming as a whole.”).
 6 Because Savage alleges that CAIR did not use the heart of his work, the third fair use factor
 7 strongly favors CAIR.

8 **3. The Fourth Fair Use Factor Does Not Consider Economic Harm**
 9 **Resulting From Criticism.**

10 Finally, Savage again urges an interpretation of the fourth fair use factor that is completely
 11 at odds with settled case law. Damage to Savage’s reputation or the “public image of the work”
 12 (Compl. at ¶ 31) – or the profitability of his program generally – as a result of criticism is not
 13 actionable under copyright law. *See, e.g.*, *Campbell*, 510 U.S. at 591-592; *Fisher*, 794 F.2d at
 14 438; *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 780 F.Supp. 1283, 1294 (N.D. Cal.
 15 1991).

16 *Even assuming* CAIR raised money by placing a single “donation” link next to its criticism
 17 of the Savage audio excerpts, that fact alone would have little bearing, if any, on an evaluation of
 18 the fourth fair use factor. *See, e.g.*, *Hustler*, 796 F.2d at 1152 (fair use found even where Rev.
 19 Jerry Falwell, the Moral Majority, Inc. and the Old Time Gospel Hour “distributed [entire] copies
 20 of the parody as an integral part of a financial appeal.”). Since its dicta (cited by Savage)
 21 regarding “presumptions of unfairness” of commercial uses of copyrighted material in *Sony Corp.*
 22 *of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Supreme Court has
 23 clarified that commercial uses do not create *any* presumptions of invalidity: “*Sony* itself called for
 24 no hard evidentiary presumption. There, we emphasized the need for a ‘sensitive balancing of
 25 interests’ and ... noted that Congress had ‘eschewed a rigid, bright-line approach to fair use,’ ...
 26 and stated that the commercial or nonprofit educational character of a work is ‘not conclusive.’”
 27 *Campbell*, 510 US at 584-85. Subsequent courts applying *Campbell* have repeatedly pointed out
 28 that the nature of the use – rather than its commercial or non-commercial status – is more

1 determinative. *See, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003); *Infinity*
 2 *Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 109 (2nd Cir. 1998).

3 Finally, it is important to note that the only “damages” inquiry relevant to an application of
 4 the fourth fair use factor centers on harm to the *underlying work*, not Savage’s reputation generally
 5 or the economic success of future copyrighted works. *See, e.g., Consumers Union of U.S. Inc. v.*
 6 *General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). Harm arising from the ability of
 7 CAIR’s use to substitute for Savage’s radio program in the marketplace is the proper focus of the
 8 fourth factor. William Patry, *Patry on Copyright* § 10:149 (2007). *See also, e.g. Campbell*, 510
 9 U.S. at 592; *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 805 (9th Cir. 2003). Savage
 10 alleges no such “substitution” damages as a result of CAIR’s use of excerpts from the October 29,
 11 2007, episode of his show. For this reason, like the many others raised by CAIR, the fourth fair
 12 use factor weighs strongly in CAIR’s favor.

13 III. PLAINTIFF’S FRIVOLOUS RICO CLAIM FAILS AS A MATTER OF LAW.

14 A. Savage Does Not Satisfy The Standing Requirements for a RICO Claim 15 Because His Pled Damages Are Barred by the Fair Use Doctrine.

16 In his Opposition, Savage backs away from the allegations in his twice-amended
 17 Complaint that the supposed RICO injury came from CAIR’s filing of allegedly frivolous lawsuits
 18 and amicus briefs. *See* Compl. at ¶¶ 45, 47, 50, 168. Instead, Savage now contends that his
 19 purported RICO damages are supposed advertising losses stemming from his spurious copyright
 20 infringement claim. *See* Opp. at 2, 16; Compl. at ¶¶ 34, 35. As a matter of law and logic, Savage
 21 cannot plead RICO damages arising from constitutionally protected speech activities. *See, e.g.,*
 22 *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989) (characterizing plaintiff’s RICO
 23 claim against newspaper for constitutionally protected report critical of him as “border[ing] on
 24 being frivolous” and affirming dismissal of this claim). Here, as explained *supra* at 6-11 and in
 25 CAIR’s Opening Brief at 6-9, 22-24, the First Amendment and the fair use safe harbor in the
 26 Copyright Act protect CAIR’s website commentary and criticism of Savage’s remarks. This
 27 protection exists irrespective of any advertising losses that Savage may have suffered.⁷ Savage’s

28 ⁷ Whether CAIR has disseminated one or one thousand letters to advertisers about Savage’s

1 alleged RICO “damages” – advertising cancellations allegedly precipitated by CAIR’s website
 2 critique – are barred by the constitutional and statutory limitations protecting free speech.
 3 Moreover, Savage cannot plead the required predicate act of criminal copyright infringement
 4 leading to damages for advertising losses because no liability can attach to such a claim where the
 5 underlying conduct falls within the exemptions for fair use of materials conferred by the
 6 Copyright Act. Since Savage has failed to meet the actual injury requirements for standing, his
 7 RICO claim must be dismissed as a matter of law.

8 Savage is also mistaken that he can meet the standing requirements for a RICO claim by
 9 alleging general damages to business or property, with no effort to show a relationship between
 10 the supposed injury and RICO violations. *See* Opp. at 16. As the Supreme Court and the Ninth
 11 Circuit have explained, Savage must show “harm to a *specific* business or property interest” that
 12 was caused “by reason” of purported RICO violations by CAIR.⁸ *See, e.g., Holmes v. Securities*
13 Investor Protection Corp., 503 U.S. 258, 268-69 (1992); *Diaz v. Gates*, 420 F.3d 897, 900 (9th
 14 Cir. 2005) (en banc). Here, any losses in advertising revenue that Savage may have suffered are
 15

16 disparaging remarks, its communications are protected not only by the fair use doctrine discussed
 17 earlier, but also by the right of organizations such as CAIR to organize an economic boycott under
 18 the First Amendment and Fourteenth Amendment. *See, e.g., NAACP v. Claiborne Hardware Co.*,
 19 458 U.S. 886, 907 (1982) (finding that execution of economic boycott that included speeches and
 20 pamphleteering with the intent of a “coercive impact” on white Mississippi merchants “does not
 21 remove them from the reaches of the First Amendment”); *Environmental Planning & Information*
22 Council v. Superior Court, 36 Cal.3d 188, 197 (1984) (finding that First Amendment precludes
 23 economic interference claim against an environmental group based on criticism contained in the
 24 group’s newsletter of local newspaper’s editorial policy and suggestion of possibility of secondary
 25 consumer boycott of newspaper’s advertisers). Accordingly, any advertising losses allegedly
 26 suffered by reason of a supposed “boycott” of Savage are not cognizable and must yield to CAIR’s
 27 exercise of its First Amendment rights of speech, assembly, association and petition to bring about
 28 political, social and economic change. *See id.*

23 ⁸ Savage’s reliance on *NOW v. Sheidler*, 510 U.S. 249, 256 (1994), is equally misplaced. In *NOW*,
 24 the plaintiffs alleged specific and potentially cognizable injuries – namely, that one of the
 25 defendants had “threatened” the administrator with “reprisals” if she refused to quit her job at the
 26 clinic and that defendants, anti-abortion activists, were conspiring to use force to induce clinic
 27 staff and patients to stop working and obtain medical services elsewhere. *Id.* In contrast to *NOW*,
 28 the alleged injury pled by Savage here, advertising losses, is not actionable because it derives from
 CAIR’s First Amendment and statutory rights to engage in constitutionally protected speech.
 Moreover, even if those protections did not apply, Savage still would not have adequately pled
 damages because he has not pled facts indicating that the advertising losses were caused by reason
 of RICO violations. And fundamentally, Savage cannot show the predicate act of criminal
 copyright infringement leading to advertising loss damages since the underlying conduct is
 privileged pursuant to the fair use doctrine in the Copyright Act.

1 immaterial to his RICO claim because these losses were *not* allegedly caused by reason of any
 2 purported relationship with a RICO enterprise involving Al Qaeda and/or Hamas. CAIR's
 3 Opening Brief at 13. Savage pleads no facts indicating that CAIR conspired with Al Qaeda and/or
 4 Hamas to commit copyright infringement against Savage, nor could he. His contention that "any
 5 success" in causing advertisers to stop advertising "was due to the copyright infringement and the
 6 false context in which the material was presented" demonstrates that the claimed injury results
 7 from purported copyright infringement and not, as it must, from an alleged pattern of racketeering
 8 activity engaged in by a RICO enterprise through an association in fact (not fiction) between
 9 CAIR, Al Qaeda, and/or Hamas. *See* Compl. at ¶¶ 36, 42. Moreover, Savage has not pled facts
 10 indicating that the advertisers even listened to the clip link on CAIR's website, a necessary
 11 predicate to establish an actual injury in accordance with the RICO standing requirements.

12 Savage's RICO claim is not novel by any stretch of the imagination; it literally is ripped
 13 from the pages of a New York complaint.⁹ Savage has even less standing to make a RICO claim
 14 than the plaintiff in that case, which is the estate of one of the 9/11 victims. Specifically Savage
 15 does not – and cannot – allege that he suffered a concrete monetary injury as a result of a RICO
 16 "conspiracy" that supposedly caused the 9/11 attacks and the terrorist actions of Hamas and Al
 17 Qaeda. The purported advertising losses from CAIR's constitutionally protected criticism have
 18 nothing to do with a RICO "conspiracy" but in fact result from Savage's own conduct. Had
 19 Savage not spewed the venomous statements demeaning Islam, Muslims and CAIR's civil rights
 20 advocacy on his radio show, he would not have lost any advertisers. Because Savage has pled no
 21 facts connecting the supposed advertising losses to a RICO conspiracy involving in the 9/11
 22 attacks and the terrorist acts of Hamas and/or Al Qaeda, Savage lacks standing, and his RICO
 23 claim is barred as a matter of law.

24 ⁹ The lawsuit is *John P. O'Neill, Sr., et al. v. Al Baraka, et al.*, No. 04 CV 01923 (RCC) filed in
 25 United States District Court, Southern District of New York. Defendant CAIR-National is among
 26 more than one hundred fifty defendants and is waiting for the judge to rule on its motion to
 27 dismiss. *See* Defendant Council on American-Islamic Relations of Santa Clara, Inc.'s Answer at ¶
 28 123. On January 18, 2008, Judge Richard Conway Casey in related cases granted motions to
 dismiss very similar RICO claims to those alleged here, finding no facts to support the claims that
 the defendants participated in directing or managing the operation or management of a RICO
 enterprise. *See In re Terrorist Attacks of September 11, 2001*, No. 03 MDL 1570 (RCC) ECF
 Case (S.D.N.Y. 2008) (opinion and order).

B. Savage Ignored the Proximate Cause Requirement, Which is Fatal to his RICO Claim.

The Supreme Court has repeatedly emphasized that a RICO claim cannot proceed unless the plaintiff shows that the defendant's conduct proximately caused the plaintiff's injury. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). Yet, Savage's Opposition says *nothing* about proximate causation, and his twice amended Complaint does not cure his pleading deficiencies in this regard, either, even though the pleadings are now locked for the purposes of this Federal Rule 12(c) motion. Savage has not pled, and cannot show, that CAIR's filing of lawsuits and amici briefs and engaging in constitutionally protected speech played *any* role – let alone a “substantial” and “foreseeable” one – in a “RICO conspiracy” that “caused” the 9/11 attacks and the terrorist activities allegedly perpetrated by terrorist groups such as Hamas. *See* CAIR's Opening Brief at 20-21; *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612-14 (6th Cir. 2003). Proximate cause requires a direct, causal relationship between the alleged wrongful conduct and the injuries suffered, but Savage's Complaint indiscriminately compiles unsubstantiated allegations together and ignores the obvious intervening and superseding factors between the alleged misconduct and the claimed injury. *See, e.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2004) (finding that “[c]ausation lies at the heart of a civil RICO claim,” and stating in context of a class action that “lumping claims together … does not diminish or dilute this requirement”). *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 127 (N.D.N.Y. 1997) (finding plaintiffs' RICO claim “has no chance of success” and sanctioning plaintiffs because they “believed that a *compilation of unsubstantiated allegations* was all that was necessary to bring a claim before the Court”) (emphasis added). Moreover, to make out a valid RICO claim a plaintiff must show that the relationship between the alleged wrongful conduct and the purported injury is logical and not speculative. *Trollinger*, 370 F.3d at 612-14. Yet, it is beyond absurd, illogical and totally unfounded to suggest that CAIR's engaging in critical political speech that Savage does not like and filing lawsuits “caused” the injuries suffered in 9/11 and its aftermath and the other terrorist attacks. In short, because Savage's Complaint and Opposition are

1 devoid of proximate cause pleading – the “heart” of any civil RICO claim, as noted in *Poulos* –
 2 this Court should dismiss it as a matter of law.

3 **C. Savage’s Claim also Fails Because He Has Not Pled That CAIR Directed or
 4 Participated in the Management of a RICO Enterprise.**

5 Savage again utterly fails to establish in his Opposition, as he failed to do in his Complaint,
 6 that CAIR directed or participated in the management of a RICO enterprise, which is a key
 7 pleading requirement of the main RICO statute, section 1962(c).¹⁰ *See Reves v. Ernst & Young*,
 8 507 U.S. 170, 185 (1993). Savage has pled *no* facts that demonstrate, nor could he, that CAIR
 9 “associated for a common purpose of engaging in a course of conduct” with Al Qaeda, Hamas, or
 10 any other terrorist group mentioned in the Complaint. *See Odom v. Microsoft Corp*, 486 F.3d 541
 11 (9th Cir. 1997) (en banc); CAIR’s Opening Brief at 18. Savage spills pages worth of ink
 12 discussing the alleged misdeeds of organizations and individuals supposedly linked to Hamas and
 13 Al Qaeda, but he has not alleged – and cannot show – that CAIR played any part in directing or
 14 managing these groups and individuals. For example, Savage pleads that Al Qaeda had annual
 15 income of approximately \$50 million and assets that ranged between \$300 million and \$500
 16 million during a 10-year period, but Savage never gives any facts indicating that CAIR received or
 17 sent out tainted money from Al Qaeda. *See* Compl. at ¶ 130. Similarly, Savage complains that
 18 Saudi Prince Alwaleed bin Talal “donated \$500,000 [presumably to CAIR] to distribute the Koran
 19 and other books about Islam in the United States,” but Savage gives no explanation of why it is
 20 improper for the gentleman dubbed the Arab Warren Buffett – the man who bailed out America’s
 21 largest bank, Citibank, in the 1990s – to donate to a charity registered in the United States. *See*
 22 Compl. at ¶ 131. On the individual level, Savage points in his Complaint to an individual named
 23 “Ghassan Elashi” who was allegedly convicted of shipping computers to Libya and Syria, but
 24 Savage pleads no facts establishing that CAIR had *anything* to do with Elashi’s purported
 25 conviction or any of the activities that led to that alleged conviction. *See* Compl. at ¶ 151. These
 26 three examples are illustrative of the kinds of innuendo that Savage has employed in his

27 ¹⁰ Savage’s suggestion in his Opposition that he intends to invoke all four sections of the RICO
 28 statute still does not cure his failure to plead those sections in the Complaint, which is now locked
 for the purposes of this Federal Rule 12(c) motion (after Savage twice amended it).

1 Complaint and in his Opposition, baseless insinuations which do not hold up under even the most
 2 perfunctory inspection.

3 Perhaps the boldest attempt at slinging mud in the hope that something will stick involves
 4 Savage's repeated references to the Holy Land Foundation. Savage treats the criminal allegations
 5 made in the Holy Land criminal prosecution as established facts, even though the government
 6 failed to secure *any* convictions against the Holy Land defendants, who are being retried. CAIR,
 7 named along with 305 other individuals and organizations, previously filed an amicus briefing
 8 seeking to strike their name and intends to refile that motion. Even more important in terms of the
 9 enterprise discussion, the fact that CAIR had a link to the Holy Land Foundation is immaterial
 10 because Savage has not pled, *and cannot plead*, any facts indicating that CAIR directed or
 11 controlled a RICO enterprise with the Holy Land Foundation or participated in any management
 12 decision by a "RICO Enterprise" in conjunction with the Holy Land Foundation to use CAIR's
 13 donations for illegal racketeering purposes. In the absence of *facts* showing an actual association
 14 between CAIR and Al Qaeda and/or Hamas, Savage cannot satisfy the enterprise requirements,
 15 and his 1962(c) claim must be dismissed as a matter of law.¹¹

16 **D. Savage's Attempt to Explain the Pleading of a Section 1962(a) Money
 17 Laundering RICO Violation is Deficient Because Savage Has Failed To Show
 18 Injury From Improper Use of Racketeering Income.**

19 The standing requirements for a Section 1962(a) claim are different than that required
 20 under the other provisions of the statute. To state a claim under Section 1962(a), a plaintiff must
 21 show injury resulting from defendant's *investment or improper use of racketeering income*.
 22 *Sebastian Intern., Inc. v. Russolillo*, 186 F. Supp. 2d 1055, 1068 (C.D. Cal. 2000). This
 23 requirement is necessary because section 1962(a) "does not state that it is unlawful to receive
 24 racketeering income[;] ... [rather] the statute prohibits a person who has received such income

25 ¹¹ The section 1962(b) claim fails as well for the same reasons. The gravamen of a section
 26 1962(b) claim is that a defendant "controls" the enterprise engaged in a pattern of racketeering
 27 activity, but Savage has not pled *any* facts suggesting that CAIR has exercised control over any
 28 RICO enterprise. Despite Savage's assertions in his Opposition to the contrary, inviting someone
 (who is "suspected" as a conspirator, perhaps only in Savage's mind) to speak at a conference
 provides no factual support for the claim that CAIR has exerted control over a RICO enterprise
 involving Al Qaeda and Hamas. *See* Opp. at 23-24. Nor does Savage's repeated references to
 groups other CAIR with supposed links to Hamas and/or Al Qaeda establish that CAIR has control
 over an enterprise in concert with those two terrorist organizations. *See id.*

1 from using or investing it in the proscribed manner.” *Grider v. Texas Oil & Gas Corp.*, 868 F.2d
 2 1147, 1149 (10th Cir. 1989).

3 In this case, CAIR did not receive any racketeering income because it was not engaged in
 4 racketeering activity. Even if CAIR had somehow received “tainted” money, which it did not, and
 5 then had gone on to bring lawsuits and to represent the interests and concerns of Muslims in the
 6 United States through constitutionally protected free speech activities, those activities do not
 7 amount to the kinds of improper uses of income that are actionable under section 1962(a).
 8 Accordingly, Savage cannot have suffered a cognizable injury from CAIR’s investments in
 9 constitutionally protected activities, and his 1962(a) claim fails for lack of standing.¹²

10 **E. Savage Still Has Not Pled Each Asserted Predicate Act of Fraud With
 11 Particularity, As He Must Under Rule 9(b).**

12 Finally, Savage wrongly insists that he set out allegations of fraud with particularity,
 13 pointing to “Paragraph 91” as evidence. See Opp. at 18. Paragraph 91 states, “CAIR further
 14 exploited 9/11 as it put on its website a picture of the World Trade Center in flames and below it a
 15 call for donations that was linked to the Holy Land Foundation.” This single sentence hardly
 16 satisfies Rule 9(b)’s mandate that a plaintiff plead the “time, place and specific content of the false
 17 representations, as well as the identities of the parties to the misrepresentation.” *Edwards v.*
 18 *Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2005); *Flores*, 416 F. Supp. 2d at 911. Savage in
 19 Paragraph 91 fails to state the time of this alleged misrepresentation, the specific parties to the
 20 misrepresentation, or concrete facts showing that CAIR was engaged in a willful
 21 misrepresentation. In the same vein, Savage asserts in the Opposition that “[r]aising money for
 22 terrorist groups under false pretenses is a fraud....,” but like the allegations of his Complaint, fails
 23 to specify which groups supposedly participated in each false pretense scheme, the time period
 24 during which the false pretenses took place, the specific content of each false pretense, and
 25 CAIR’s role in any alleged false pretenses scheme. See Opp. at 18. Because Savage has utterly

26 ¹² It is axiomatic that there can be no RICO conspiracy without the defendant committing a RICO
 27 violation of at least one of the violations detailed in section 1962(a), (b), or (c). *Flores v. Emerich*
 28 & *Fike*, 416 F. Supp. 2d 885, 911-12 (E.D. Cal. 2006). Here, since Savage’s section 1962(a), (b),
 (c) claims fail as a matter of law for the reasons stated above, it follows that his conspiracy claim
 under section 1962(d) fails as well. See also RICO predicate act discussion of conspiracy
 allegations in CAIR’s Opening Brief at 16-17.

1 failed to meet the heightened pleading requirements of Rule 9(b), his RICO claim should be
 2 dismissed for this independent reason.

3 **IV. THE FIRST AMENDMENT PROVIDES A SEPARATE AND COMPLETE
 4 DEFENSE TO SAVAGE'S CLAIMS.**

5 Savage's Opposition make unambiguous that his real grievance is that CAIR's critique on
 6 its website allegedly "misappropriated" his work and "facilitate[d] an unfair economic attack
 7 against him." Opp. at 1, 12. Whether characterized as disparagement, intentional interference with
 8 economic relations, misappropriation, defamation, or false light, these types of claims are *all*
 9 subject to the constitutional limitations protecting free speech because the "gravamen" of Savage's
 10 Complaint is the "alleged injurious falsehood of a statement." *See* CAIR's Opening Brief at 23-
 11 24. This Court must not allow Savage to evade the protections granted to constitutional exercises
 12 of speech by pleading specious Copyright and RICO violations in a weak attempt to sidestep the
 13 California anti-SLAPP statute. Savage's concession that his only possible RICO damages derive
 14 from purported advertising losses supposedly caused by CAIR's linking to a small portion of the
 15 infamous radio clip makes plain that the true aim of his lawsuit is to intimidate and silence CAIR
 16 in retaliation for CAIR's criticism of his radio rants. *See* Opp. at 16-17. Courts have not hesitated
 17 to dismiss complaints like Savage's that target free speech and seek to use "creative pleading" to
 18 "render[] nugatory the First Amendment limitations placed on litigation against speech." *Films of*
 19 *Distinction, Inc. v. Allegro Film Productions, Inc.*, 12 F. Supp. 2d 1068, 1082 (C.D. Cal. 1998).
 20 As Savage himself pleads, "[i]t is the essence of freedom that voices can be raised strongly and
 21 without fear of illegal retaliation." *See* Compl. at ¶ 42. In the spirit of that statement, this Court
 22 should summarily dismiss with prejudice Savage's legal attack on CAIR's constitutionally
 23 protected free speech rights.

24 DATED this 22nd day of February 2008.

25 DAVIS WRIGHT TREMAINE LLP

26 ELECTRONIC FRONTIER FOUNDATION

27 By: /s/ Thomas R. Burke
 28 THOMAS R. BURKE
 Attorneys for CAIR Defendants